

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the)	
Telecommunications Act of 1996)	
)	CC Docket No. 96-115
Telecommunications Carriers' Use)	
Of Customer Proprietary Network)	
Information and Other Customer)	
Information)	
)	
Implementation of the Non-Accounting)	
Safeguards of Sections 271 and 272 of)	CC Docket No. 96-149
The Communications Act of 1934, as)	
Amended)	

Comments of ALLTEL Communications, Inc.

ALLTEL Communications, Inc. ("ALLTEL")¹ submits its comments in response to the Commission's "Clarification Order and Second Further Notice of Proposed Rulemaking" in the above-captioned matter.² As an initial matter, ALLTEL notes the scope of the record in this matter existing prior to the issuance of the Court's order in US West v. FCC,³ and incorporates its prior comments in these dockets by reference. As

¹ ALLTEL is the subsidiary of ALLTEL Corporation through which, various affiliates and subsidiaries provide competitive telecommunications services including CMRS services and long distance. ALLTEL Corporation also provides local exchange service through various subsidiary local exchange companies and information services through ALLTEL Information Services, Inc.

² See, Clarification Order and Second Further Notice of Proposed Rulemaking, CC Dockets Nos. 96-115 and 96-149, FCC 01-247 (released September 7, 2001) (the "Order and FNPRM"). The Order and FNPRM was published in the Federal Register on October 2, 2001. See, 66 Fed. Reg. page 50140.

³ US West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999), cert. denied, 120 S. CT. 2215 (June 5, 2000)

ALLTEL argued previously in this matter, Section 222 of the Act is essentially self-executing and, despite the few early and ill-considered requests of certain parties, neither the Act nor the underlying public policy concerns required the Commission to issue definitive rules governing the use of customer propriety network information (“CPNI”).

The Commission, however, previously mandated that subscribers be required to provide their affirmative consent through a detailed and cumbersome opt-in procedure before CPNI could be shared internally among corporate subsidiaries and affiliates to ensure that subscribers knowingly approved the sharing of their CPNI. But CPNI could be shared with other corporate affiliates that had a direct relationship with the customer, because such sharing would not implicate privacy concerns.⁴ Despite the protests of industry, the Commission rejected opt-out mechanisms due in large part to concerns that subscribers would ignore a carrier’s disclosures, fail to comprehend their rights under Section 222 or otherwise fail to understand how those rights could be protected.⁵ As to competitive matters, the Commission further concluded that an opt-in approach limited the advantage that incumbent carriers have over new entrants.⁶ Ultimately, the Tenth Circuit vacated the Commission’s rules, finding that an opt-in approach was far too restrictive and had not been sufficiently justified.⁷

(No. 99-1427) (“US West v. FCC”).

⁴ Order and FNPRM at ¶ 14.

⁵ Id. at ¶ 15.

⁶ Id.

⁷ U S West, Inc. v. FCC, 182 F.3d 1224, 1240 (10th Cir. 1999), cert. denied, 120 S. CT. 2215 (June 5, 2000) (No. 99-1427).

The Order and FNPRM, issued by the Commission to clarify the status of the CPNI rules,⁸ first solicits comment on the Commission's interpretation that US West v. FCC vacated only that portion of the rules mandating the opt-in approach. In the Commission's view, the remainder of the rules, and in particular, the rules governing notifications, remain in effect.

ALLTEL believes that there remain serious questions as to the extent of the Court's order and its effect ultimately on the vitality of the Commission's CPNI rules in their entirety. As a practical matter, and in the interest of both brevity and regulatory certainty, ALLTEL will, for purposes of these comments, forgo detailing those arguments.⁹ ALLTEL notes, however, that at a minimum and insofar as the Commission previously concluded that the decision in US West v. FCC vacated the CPNI rules in their entirety,¹⁰ the Commission's current interpretation should not be applied retroactively. Carriers deserve that degree of certainty, and while the Commission has authority to change its rules and policies where adequately justified,¹¹ it cannot apply those rules or policies retroactively.¹²

The Commission next seeks to augment what, in ALLTEL's view, is a complete record on the ways that subscribers may provide consent to a carrier's use of their CPNI. In particular, the Commission seeks comment on what methods of approval would serve

⁸ 47 C.F.R. §§ 64.2001-64.2009.

⁹ ALLTEL does not forgo any rights it may otherwise have to delineate and pursue those arguments further in this proceeding or, if necessary, on appeal.

¹⁰ MCI Telecommunications Corp. v. Pacific Bell, 14 FCC Rcd 15362, ¶ 13 (1999) (court "vacated CPNI Order").

¹¹ Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (1970).

¹² See, Bowen v. Georgetown University Hospital, 488 U.S. 204, 208-09 (1988).

the government interests at issue (consumer privacy and market competition).¹³ ALLTEL continues to believe that an opt-out approach best serves the interests of all parties and addresses the Tenth Circuit's concerns. Adopting the opt-out approach is minimally burdensome in those instances where subscriber consent is required and in no way precludes any carrier from going further by adopting an opt-in approach, either voluntarily or in response to the carrier's particular regulatory issues. In essence, ALLTEL believes that the "interim" approach used while this proceeding has been pending is a balanced approach that avoids the constitutional issues that gave rise to the Tenth Circuit's decision in the first instance.

ALLTEL consequently suggests that carriers be permitted to obtain customer consent, consistent with the notice requirements of Section 64.2007(f), using the opt-out mechanism without precluding the use of the opt-in mechanism if so chosen, or if the carrier's regulatory status so requires.¹⁴ This approach is plainly sensible. It reduces the huge administrative and customer service burdens on carriers while affording subscribers an informed choice as to the use and distribution of their CPNI.

The opt-out approach has been adopted in regulating other industries where the consumer information to be protected is far more sensitive than calling patterns and numbers. Rules governing personal information in the healthcare industry permit the use of opt-out mechanisms.¹⁵ The Department of Health and Human Services has stated that "[a]mong different sorts of personal information, health information is among the most

¹³ Order and FNPRM at ¶ 12.

¹⁴ Id. at ¶ 8.

¹⁵ See, the Final Rule promulgated by the Department of Health and Human Services creating "Standards for Privacy of Individually Identifiable Health Information", 65 Fed. Reg. 82812 (2000).

sensitive.”¹⁶ Subscriber concerns over the use or disclosure of their CPNI are significantly less than the concerns these same subscribers may have as patients and with regard to their health information.

Similarly, banking and financial information, considered by most to be highly confidential, is still subject to less restrictive regulations than those imposed by the FCC on CPNI prior to the US West v. FCC decision. Under rules issued by the Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System (“FRB”), the Federal Deposit Insurance Corporation (“FDIC”), and the Office of Thrift Supervision (“OTS”),¹⁷ regulated parties may disclose nonpublic personal information to a nonaffiliated third party only if: (a) the party discloses to the consumer that such information may be disclosed to such third party; (b) the consumer is given the opportunity, before the information is disclosed, to prevent the information from being disclosed; (c) the consumer is provided an explanation on how to exercise the right to prevent disclosure; and (d) the customer does not exercise the right.¹⁸ This rule

¹⁶ 65 Fed. Reg. 82464 (2000).

¹⁷ The financial services model is an implementation of the Gramm-Leach Bliley Act. Gramm-Leach Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (“GLBA”). Section 504 of the GLBA provides that the Office of the OCC, FRB, FDIC, OTS and other departments and agencies after consultation with representatives of state insurance authorities designated by the National Association of Insurance Commissioners, are to prescribe regulations to carry out the relevant privacy provisions of the GLBA. The FRB, OCC, FDIC and OTS decided to act jointly in proposing rules to implement the GLBA privacy provisions with respect to entities under their jurisdiction (Privacy of Consumer Financial Information, 65 Fed. Reg. 8770 (June 1, 2000), proposed February 22, 2000). On June 1, 2000, the Agencies published the final version of the Privacy Rule (Privacy of Consumer Financial Information, 65 Fed. Reg. 35162 (June 1, 2000)).

¹⁸ Section 6802 reads in relevant part:

(b) Opt out

(1) In general

A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless -

(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by

expressly provides that these steps are satisfied with an opt-out approach. The financial institutions that are subject to this rule are considered to have provided reasonable notice and to have obtained informed consent if notice is mailed to the customer and the customer is provided an opportunity to opt-out by returning a form, by calling a toll-free telephone number, or by “any other reasonable means” within thirty (30) days of the date the financial institution mailed the notice.¹⁹ When applied in the context of CPNI, these rules raise the prospect of a workable compromise, although ALLTEL notes they govern disclosure to *non-affiliated* third parties unlike the CPNI rules under consideration, which apply to corporate affiliates.

ALLTEL believes that location information should be addressed in a separate proceeding, as has been suggested in the petition filed by the Cellular Telecommunications and Internet Association (“CTIA”).²⁰ Location information was included in to the definition of CPNI as a consequence of the amendments to Section 222(f).²¹ The standard for authorized use or disclosure of location information, as set forth in Section 222(f), differs from that generally applied to other forms of CPNI. Clearly, real time and historical location information is sensitive and may justly require

the regulations prescribed under section 6804 of this title, that such information may be disclosed to such third party; (B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and (C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option.

15 U.S.C.A. §6802(b)(1) (West Supp. 2001).

¹⁹ 65 Fed. Reg. 35203 (June 1, 2000).

²⁰ Cellular Telecommunications and Internet Association (“CTIA”) Petition for Rulemaking on this issue. See, Wireless Telecommunications Bureau Seeks Comment on Request to Commence Rulemaking to Establish Fair Location Information Practices, WT Docket No. 01-72, Public Notice, DA 01-696 (released Mar. 16, 2001).

²¹ Order and FNPRM at ¶ 22.

the express consent of the subscriber for location CPNI raises privacy and safety issues not implicated by other forms of CPNI. ALLTEL, however, notes that Section 222(f), by its terms, does not apply to non-licensees.²² It is consequently unclear as to whether non-licensee service providers can be liable under the Communications Act for their unauthorized use or disclosure of location information. The Commission must either clarify that its rules will apply to non-licensees or otherwise conform to the regulation of non-carriers by other federal agencies. ALLTEL urges the Commission to go forward with the proceeding suggested by CTIA.

Respectfully submitted,

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²² See 47 U.S.C.A. § 222(c)(1) (West Supp. 2001).